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No. 82-1377

In the Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR I. MCKAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the termination of his federal employment violated the First Amendment and applicable agency regulations.

1. Petitioner was employed by the Inaugural Committee in connection with the inauguration of President Nixon (Pet.App. 4a, 32a). On the basis of his contacts with Nixon administration White House personnel, petitioner was appointed in 1973 as counselor for foreign students in the Agency for International Development (AID) and was given the title of "Social Welfare Specialist" (*id.* at 4a, 32a). He occupied what is termed an "administratively determined" (AD) position (*id.* at 9a, 32a). AD positions at AID are authorized by 22 U.S.C. 2385(b), which provides in part that "not to exceed one hundred and ten [employees] may

be appointed, compensated, or removed [by AID] without regard to the provisions of any law * * *" (Pet. App. 10a). From the outset of his employment, petitioner was aware that his position was an AD position, that he served at the pleasure of the AID Administrator, that he was not covered by any civil service protection, and that, if terminated from his AD appointment, he had no reemployment rights in the government service (*ibid.*).

In 1977, Lavern W. Newton, who was the principal Special Assistant to the Administrator of AID and had authority over the appointment and removal of AD personnel, conducted a review of the agency's AD positions in order to determine their best possible use (Pet. App. 11a, 35a). Newton's view was that AD appointments should be used only for important policymaking and managerial positions and that AD appointments to positions of comparatively minor importance should therefore be terminated (*id.* at 11a-12a, 36a). During his review, Newton noted that petitioner held a low-level position in the chain of command and was not performing critical policymaking or managerial functions. Newton consequently concluded that petitioner's AD appointment should be terminated because it was a misallocation of the valuable AD appointing authority (*id.* at 12a).

Petitioner was notified of the termination of his AD appointment by letter dated May 5, 1977. This letter did not explain the reason for petitioner's termination but stated that "[t]his action should not be construed in any way as a reflection on you personally" (Pet. App. 13a, 24a). Section 12H of AID Handbook 25 (Jan. 30, 1975), which dealt with the "Separation of an Administratively Determined (AD) Employee," provided in part that when notification of termination was sent to an AD employee, it should contain,

inter alia, "[t]he reasons for the action in sufficient detail as to be clearly understood by the employee * * *" (Pet App. 23a-24a).[1]

Petitioner filed suit in the Court of Claims, alleging, among other things, that his employment at AID was terminated because of his political beliefs. The trial judge held that the preponderance of the evidence showed conclusively that petitioner's political affiliation and beliefs were not known to the AID officials who decided to terminate his employment and did not play any part in that decision (Pet. App. 5a). The trial judge also held that, although AID failed to follow its personnel regulation by not informing petitioner of the reasons for his termination, this failure did not adversely affect any of petitioner's substantial rights. Since

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[1]Paragraph 12H also provided as follows (Pet. App. 33a):

> 12H *Separation of an Administratively Determined (AD) Employee*
>
> 1. A person appointed to an Administratively Determined (AD) position serves at the discretion of the Administrator and may be terminated any time his/her services, for any reason, are no longer needed.
>
> • • • • •
>
> 2. *Procedures*
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> • • • • •
>
> b. SER/PM prepares the letter notifying the employee that the AD appointment will be terminated. The letter contains the following information:
>
> (1) The reason(s) for the action in sufficient detail as to be clearly understood by the employee;
>
> (2) The date the AD appointment will be terminated;
>
> (3) Information concerning entitlement to severance pay; and
>
> (4) Information concerning reinstatement rights, if any.

that error was not prejudicial, the court refused to award damages or to order petitioner's reinstatement (*id.* at 25a-27a).

The court of appeals affirmed, holding that substantial evidence supported the findings of the trial judge that petitioner was not dismissed for his political beliefs or affiliation and that the agency's procedural errors were technical and harmless (Pet. App. 38a).

2.a. Petitioner first argues (Pet. 4-6) that the court of appeals' decision conflicts with *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), insofar as the court of appeals held that AID's procedural violations were harmless. This argument lacks merit. In *Vitarelli*, a federal employee was notified that he was being terminated as an employee of the Department of the Interior for national security reasons. Although the Department could have summarily dismissed Vitarelli without giving any reason, the Department chose to dismiss him on the ground that he was a security risk, and Department regulations provided significant procedural protections for employees dismissed on that basis. These safeguards, which were instituted because of the seriousness of the allegation of being a security risk, included the right to a specific and detailed statement of charges against the employee, the right to a hearing before a security hearing board, and the right to cross-examine the government's witnesses. This Court held that the agency's failure to follow these regulations required nullification of the Secretary's decision to dismiss the employee on national security grounds. Vitarelli was thus ordered reinstated subject to any lawful exercise of the Secretary's authority to dismiss him from employment.

The decision below does not conflict with *Vitarelli* because none of petitioner's substantial rights was affected by AID's failure to specify the reason for his dismissal. Even if such notice had been given, there would have been no

legal basis upon which petitioner could have endeavored to avoid dismissal. Since he held an AD position, he served at the pleasure of the AID Administrator; he could be terminated at any time and for any reason that the Administrator deemed appropriate; and he had no right to a hearing or to appeal (Pet. App. 25a-27a). In short, the agency's personnel rules did not grant petitioner any significant procedural protections or safeguards, and therefore AID's failure to follow its own rules was a technical and harmless error (*id.* at 27a, 38a).[2]

Petitioner contends (Pet. 5) that *Vitarelli* is nevertheless applicable because Vitarelli was also terminable at will. However, petitioner overlooks the fact that although Vitarelli was terminable at will for reasons other than national security, the Department chose to dismiss him on national security grounds and was accordingly obligated to give him the substantial procedural safeguards applicable in such cases. Here, AID did not dismiss petitioner on grounds that guaranteed him significant procedural rights.

b. Petitioner next contends (Pet. 7-8) that the court of appeals' decision conflicts with *Elrod* v. *Burns*, 427 U.S. 347 (1976). Under that decision, a former public employee who claims to have been wrongfully dismissed must prove that he was discharged because he was not "affiliated with or sponsored by" a particular political party. *Branti* v. *Finkel*, 445 U.S. 507, 517 (1980). In this case, both lower courts found that petitioner failed to make such a showing. The trial judge held that the evidence conclusively established that petitioner's political affiliation and beliefs were

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[2]In any event, although petitioner was not told the reasons for his discharge when he received notice of termination, he has since been informed of those reasons. Because AID's reasons for discharging AD personnel are not subject to challenge, no purpose would be served by ordering petitioner's reinstatement at this time.

not known to the AID officials who decided to terminate his employment and did not play any part in that decision (Pet. App. 5a). The court of appeals affirmed, holding that there was substantial evidence to support the trial judge's finding that petitioner's termination did not result from his political affiliation or beliefs (*id.* at 38a). This Court ordinarily declines, absent the most exceptional circumstances, to review factual determinations in which the trial court and the court of appeals have concurred. *Branti* v. *Finkel, supra,* 445 U.S. at 512 n.6. There is no reason to depart from that practice here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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